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In The

Supreme Court of the United States

October Term, 1988

JOHN ROE,

Petitioner,

vs.

CALIFORNIA SUPERIOR COURT,
COUNTY OF MARIN,

SHERRY DOE,

Real Party in Interest.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION 4

BRIEF IN OPPOSITION

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SUMMARY OF REASONS FOR DENYING PETITION

Petitioner's primary reason for requesting certiorari is that this case involves the constitutionality of California Evidence Code section 621, which is pending in *Michael H. and Victoria D. v. Gerald D.*, No. 87-746. (Petition p. 3.) Although they involve the same statute, the two cases raise fundamentally different legal issues because of the significant difference in the facts and procedural contexts of each. Moreover, *Michael H.* was a published decision, which therefore set a precedent. The present opinion is not published, and therefore has no precedential weight.

In *Michael H.*, Michael and Victoria sought to establish that Michael was Victoria's biological father even though Victoria's mother, and her husband Gerald, were still living together with Victoria as a family. Gerald objected to this disruption. It was primarily because of California's strong public interest in upholding the integrity of an intact family that the Court of Appeal held that Evidence Code section 621 could constitutionally bar the action.

The present case is extremely different. Sherry and her husband, James, had dissolved their marriage before Sherry filed the present paternity action. That dissolution judgment determined that Sherry's daughter, Sabrina, was not James' child. This was because the parties had learned that James' blood type was AB, and that Sabrina's was O. Therefore, James could not be Sabrina's father. Petitioner, John, nevertheless seeks to use Evidence Code section 621 as a shield against allowing a determination that he is Sabrina's father.

If this court were to reverse *Michael H.*, and to hold that the statute is unconstitutional on those facts, then

there would be even more reason to uphold the Court of Appeal's decision in the present case, since it held that the statute was unconstitutional as applied here. Even if this court were to affirm *Michael H.*, that would not compel a different result here because allowing the present action to proceed does not threaten to disrupt an intact family. John's assertion that the Court of Appeal opinion "further disrupts" a bond between Sabrina and James is patently false. The only reasonable conclusion is that certiorari in the present case, or further consideration in light of what this court decides in *Michael H.*, is unnecessary.

Denial of the petition now is also important for another reason. Under California law, Sherry cannot obtain child support from John until there is a determination of his paternity. *Thomas B. v. Superior Court*, 175 Cal.App.3d 255, 258; 220 Cal.Rptr. 577 (1985). Sherry filed this action in April of 1986. As a result of John's appellate challenges, paternity has yet to be decided. All during this time Sabrina has been denied support from John. Since James is not Sabrina's father, the court-ordered judgment in his divorce from Sherry does not require him to support Sabrina. Sabrina should not have to wait any longer to receive support from John, if he is in fact her father.

Petitioner's second reason for requesting certiorari is the assertion that the trial court, and the Court of Appeal, relied on an incorrect test in analyzing the constitutional issue. Petitioner asserts that the rational relationship test should be used, instead of the balancing test adopted by the California Supreme Court in *In re Lisa R.*, 13 Cal.3d 636; 119 Cal.Rptr. 475; 532 P.2d 123 (1975), which had followed this court's decision in *Stanley v. Illinois*, 405

U.S. 645 (1972). Petitioner did not raise this argument until after he had lost in the Court of Appeal. This alone is a sufficient reason to deny certiorari.

Moreover, petitioner is incorrect on the merits. The rational relationship test is used to assess the constitutionality of economic legislation. Fundamental personal rights are at stake where parentage is involved. Indeed, petitioner concedes that it is correct to use the balancing test when a father seeks to establish his parentage. The right of a mother or child to establish who is the child's father is as much a fundamental right as is that of a father to determine whether a child is his.

Certiorari should also be denied because the petition greviously misstates the facts. From reading the petition, one would think that Sherry had almost randomly selected John as Sabrina's alleged biological father, that she unreasonably waited until Sabrina was over 4 years old to bring an action to establish John's parentage, and that Sabrina had no relationship with John. In fact, John and Sherry had a serious, long-standing relationship. During it, John promised to marry Sherry and he became very close to Sabrina. Sabrina called John "daddy", and she was enrolled in pre-school under John's last name. Sherry did not bring this action sooner precisely because that relationship led her to believe that a paternity action against John was unnecessary. It was not until John changed his mind about marrying Sherry, and stopped supporting her and Sabrina financially, that Sherry had any reason to file this action. It would have been unreasonable to require Sherry to have sued John sooner than she did.

In a petition for certiorari, the petitioner is not required to support his factual statements with references

to the trial court record, and that record unfortunately is not before this court. Therefore, in this answer Sherry will set forth more of the underlying facts, to assist this court in understanding why the result reached by the Court of Appeal is correct.

Finally, in her briefs in the California courts, Sherry explained that the trial court's decision was correct for several additional reasons. The Court of Appeal did not have to reach these issues because of the manner in which it disposed of the case in Sherry's favor by holding that the statutory presumption of section 621 could not be applied to shield John.

First, the presumption that Sherry's husband James was Sabrina's father had been properly rebutted by the judgment entered in their divorce. It adjudicated that Sabrina was not James' child. Therefore, John cannot defend against this action by asserting that James must be Sabrina's father by virtue of a statutory presumption. Thus, it would be an idle act for this court to grant certiorari. Even if it reached a different conclusion from that of the Court of Appeal on the constitutional issue tendered by John, the result would not change.

Second, Evidence Code section 621 is unconstitutional here for a reason which the Court of Appeal also did not reach. It discriminates between men and women without any rational basis. A woman can only rebut the presumption if she submits an affidavit from the biological father which admits his paternity. The husband does not need to do this.

Third, the two year statute of limitations for rebutting the presumption is too short to pass constitutional muster under this court's recent decision in *Clark v. Jeter*, ___U.S. ___; 108 S.Ct. 1910; 100 L.Ed.2d 465 (1988), which

invalidated Pennsylvania's six year statute of limitations for paternity cases.

STATEMENT OF FACTS[1]

In 1974, Sherry married James Conrad. (Ex. 18.) They had a daughter, Alexis, who is not involved in the present proceeding. *Ibid.* Sabrina was born on July 30, 1981. *Ibid.* James filed for dissolution of marriage on November 14, 1982. (Ex. 17, 58.) His petition listed Sabrina as a child of the marriage. (Ex. 58.) Sherry's response listed Sabrina as a child of the marriage because she thought that this meant Sabrina was born during the marriage, which she was. (Ex. 60, RT 97:21-26.)

Sabrina, in fact, is not James' child. (Ex. 13:7-10.) Blood tests performed before Sabrina's second birthday established that it was impossible for James to be her father. When James had given blood in 1974, the Sonoma County Community Blood Bank determined that his blood type was AB. (Ex. 15.) Medical records of the Kaiser Permanente Medical Center in San Rafael dated August 5, 1981, show that both Sherry and Sabrina have type O blood.[2] (Ex. 16.)

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[1] The record citations in parentheses are to the page numbers of the exhibits John filed in support of his petition for a writ of mandate in the Court of Appeal, (Ex——) and to the Reporter's Transcript (RT——). Not all these facts were included in the Court of Appeal's opinion.

[2] John claims that Sherry did not offer the blood tests into evidence, and that they lacked a proper foundation. (Petition 6, ¶¶ 2-3 of fn.) These claims are specious. Sherry attached the

(Continued on following page)

These facts came to James' attention during the summer of 1983. (RT 115:23-116:6.) Since the blood types precluded James from being Sabrina's father, Sherry and James reached an agreement on this subject in August of 1983. (RT 116:3-6.) They incorporated this into a Marital Settlement Agreement in their pending dissolution, rather than litigating the issue. (Ex. 13:6-15, 18:¶¶f.) This agreement recited that James was not Sabrina's natural father. (Ex. 13:10-11, 18:12-13.) James and Sherry therefore agreed to joint custody over Alexis, while both legal and physical custody of Sabrina was given to Snerry alone. (Ex. 19:¶2.) Provisions were made for James to visit with, and to pay child support for, Alexis; no such provisions were made with respect to Sabrina. (Ex. 19:¶¶2-3.) This agreement was incorporated into a judgment of dissolution of marriage on December 23, 1983. (Ex. 17.)

On April 30, 1986, Sherry commenced the present paternity action by filing a complaint against John under the Uniform Parentage Act, California Civil Code sections 7000 et seq. (Ex. 2.) What follows are the reasons

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(Continued from previous page)

documents to a declaration in support of her original order to show cause. (Ex. 10-16.) She also attached them to her motion to compel John to take blood tests. (Ex. 257-271.) Under California law, a motion can be decided based on declarations alone. *Reifler v. Superior Court*, 39 Cal.App.3d 479, 483; 114 Cal.Rptr. 356 (1974).

John did not object to the manner in which the blood test evidence was presented until after the trial court had ordered him to have a blood test, when he made a motion for reconsideration. (Ex. 378:23-379:2.) Before then, John's only objection was that the blood tests were irrelevant because James was conclusively presumed to be Sabrina's father under California Evidence Code section 621. (Ex. 42-50, 282-291.) John therefore waived any other potential evidentiary error in admitting them. Cal. Evid. Code, § 353.

that Sherry brought this action against John, and the reasons that she did not bring it earlier.

Sherry and John met in 1970. (RT 59:3-7.) In 1980, they became intimate and began to see each other on a regular basis. (RT 59:8-20.) Sherry told John when she learned that she was pregnant. (RT 59:23-25.) She was not sure who the father was because she was still married to James. (RT 60:4-7, 61:18-26.) After Sabrina's birth, Sherry and John continued to see each other regularly. (RT 63:8-14.) John also gave Sherry substantial financial assistance. (RT 108:4-24, 109:12-110:10.) When Sabrina was nine months old in 1982, Sherry and James separated because of her involvement with John. (RT 63:24-28.)

As Sabrina developed, she resembled John physically. (RT 64:1.) Sherry started to believe more strongly that John could be Sabrina's father. (RT 64:24-65:1, 69:21-70:4, 70:25-71:6.) Sherry told John that she wanted to tell James about her suspicions, because she felt guilty concealing them. (RT 81:2-4, 97:1-3.) John did not want Sherry to tell James, because it would result in bad publicity for John. (RT 97:4-5.) James could use this information against John, who was already having problems with the press. (RT 97:5-9.)

John pleaded with Sherry not to say anything. (RT 81:6.) He told her that everything would work out. (RT 81:7-10, 97:9-10.) They would get married, he would take care of them, and they would have a wonderful life together. (RT 81:7-10, 97:9-10.) Sherry therefore did not tell James. (RT 81:11-15.)

John acknowledged that he intended to marry Sherry. (RT 129:22.) For example, in August 1982 he wrote a twelve page letter describing a scenario for their wedding. (Plaintiff's Exhibit No. 9, RT 89:28-90:20.) John sent

Sherry many letters declaring his undying love. (RT 87:21-90:23, Plaintiff's Exs. Nos. 6-9.) One such letter was for Sherry's birthday on June 4, 1983 which was before Sabrina turned two. (RT 89:4-9.) In July 1983, John gave Sherry an $11,000 engagement ring. (RT 138:18-28.) In October of 1983, John and Sherry started living together in Mill Valley, in a house that they selected together and John purchased. (RT 119:22-28, 132:21-133:2.)

According to Sherry, John did not divorce his wife because he was hoping that she would get fed up with the situation and divorce him. (RT 105:28-106:6.) John did not want to hurt his wife because they had been married for a long time. (RT 106:7-8.) He was also trying to avoid hurting his children. (*Ibid.*) John told Sherry that it would take some time, but that eventually it would happen. (RT 106:9-10.) Sherry believed him. (RT 109:10.) John also told Sherry that in his heart, he knew Sabrina was his child. (RT 106:16-19.) Although John contradicted some of Sherry's testimony, he never denied this.

Sherry also testified that she and John had the following discussion about their plans: John told Sherry that he would divorce his wife, but that this might take some time because he cared for his wife and did not want to hurt her. (RT 80:15-18.) He told Sherry that he loved her, that they would get married, and that he would adopt Sabrina. (RT 80:18-19.) Sherry realized that it would be bad for John's reputation if the fact that he was Sabrina's biological father became known. (RT 97:14-15.) She believed John would adopt Sabrina when they married. (RT 80:19, 106:13-15.) If they did it that way, no one would ever question anything. (RT 97:13-17.) John denied that they had this conversation, and that he ever promised to adopt Sabrina. (RT 128:3-5.)

The trial court found that John did promise to adopt Sabrina, but that this did not occur until after she turned two years old. (Ex. 252:19-21.)

John acted like a "proud father" towards Sabrina. (RT 21:10-12, 24:7-9.) Sabrina acted like John's daughter by calling him "Daddy." (RT 28:4-18, 30:16-23.) Sabrina was enrolled in preschool in 1983 under the name of Sabrina McKean. (RT 65:24-66:5, 69:1-4.) McKean is John's last name. (Ex. 2.)

In March of 1985, Sherry moved to Arizona. (RT 109:1-5.) John continued to assist her financially, by sending $2,750 per month. (RT 109:6-19.) In January of 1986, John's wife found out that John and Sherry were together and was quite upset. (RT 110:11-21.) John told his wife that he was sorry, but he was leaving her. (RT 110:21-25.) John, however, did not leave his wife. (RT 110:28.) Instead, he stopped sending money to Sherry. (RT 121:4-8.) Sherry therefore filed the present paternity action in April of 1986. (Ex. 2.)

The foregoing establishes that Sherry did not single out some anonymous man, or even a man with whom she had a short fling, and sue him to establish his parentage of her daughter. Rather, Sherry and John were deeply involved in a serious relationship. Sherry did not bring a paternity action earlier, because she reasonably thought that John was going to marry her and to adopt Sabrina. Then, no one would ever have to know that Sabrina was the child of their extra-marital affair. Regardless of when John promised to adopt Sabrina, regardless of whether John ever acknowledged his biological fatherhood of Sabrina, and regardless of whether John ever asked Sherry not to sue him, the reality is that it would be

unreasonable to require her to have filed a paternity action against John any sooner than she did.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

I. PETITIONER DID NOT RAISE THE CONSITUTIONAL ISSUE IN A TIMELY FASHION BECAUSE HE DID NOT CHALLENGE THE BALANCING TEST, AND ARGUE THAT THE RATIONAL RELATIONSHIP TEST SHOULD BE USED INSTEAD, UNTIL AFTER HE HAD LOST IN THE CALIFORNIA COURT OF APPEAL.

The petition seeks review on the ground that the Court of Appeal used an incorrect test to determine whether California Evidence Code section 621 was constitutional as applied to the present facts. (Petition 10-16.) John attacks the Court of Appeal for using the balancing test articulated in *In re Lisa R., supra,* 13 Cal.3d 636; 119 Cal.Rptr. 475; 532 P.2d 123, which followed this Court's decision in *Stanley v. Illinois, supra,* 405 U.S. 645. (Petition p. 10.) As explained immediately below, petitioner did not challenge this test, nor argue that the rational relationship test should be used instead, until after he had lost in the Court of Appeal. Therefore, it should not be considered by this court now.

The trial court held that the application of Evidence Code section 621 to the present facts would deny due process. It resolved that issue by applying the balancing test articulated by the California Supreme Court in *In re Lisa R., supra,* 13 Cal.3d 636; 119 Cal.Rptr. 475; 532 P.2d 123. (Exhibits to Petition 387-394.) Petitioner did not challenge that approach in his petition for writ of mandate filed in the Court of Appeal. Rather, he argued that this

constitutional balancing test supported application of section 621 here. (Petition in the Court of Appeal 21:2-25:16.)

The Court of Appeal requested opposition. Sherry explained why this balancing test required a decision that the application of section 621 would violate due process on the present facts. Petitioner's reply brief did not dispute that the balancing test was the proper approach. (Petitioner's Reply Brief In Support Of Writ Petition 9:14-12:8.) The petition was denied by the Court of Appeal without opinion.

John then filed a petition for review in the California Supreme Court. He did not argue that the rational relationship test should be used instead of the balancing test. (Petitioner's First Petition For Review 14:17-16:20.)

The California Supreme Court granted review and transferred the matter to the Court of Appeal with instructions to issue an alternative writ. Sherry then filed a return to the alternative writ. She further explained why the balancing test of *Lisa R.* precluded the application of section 621 here on due process grounds. (Real Party's Return 28-43.) John filed a replication which did not challenge the balancing test. (Replication 1-8.) None of his many briefs cited any of the decisions on which he now relies for this argument.

The Court of Appeal issued its opinion affirming the trial court's decision on June 17, 1988. Only then did John file a petition for rehearing where he argued, for the first time, that the rational relationship test, rather than the balancing test, should be used to determine whether the application of section 621 would deny due process. (Petition For Rehearing 1-11.) The Court of Appeal denied the

petition for rehearing and the opinion therefore does not discuss John's untimely new argument.

This court should not grant certiorari to consider an issue which petitioner raised so late in the proceedings.

II. THE COURT OF APPEAL WAS CORRECT TO USE THE BALANCING TEST TO DECIDE THE DUE PROCESS ISSUE.

Petitioner's new position is that section 621 satisfies due process, if there is any rational basis on which its application can be sustained. (Petition 13-16.) He argues that the balancing test only applies when a fundamental right is being asserted. On petitioner's view, a child does not have a fundamental right to determine who her father is, or to seek child support from him. This is incorrect.

First, a child has no less of a fundamental right to know who her father is, than a father has to know who his child is. The only decision which petitioner cites in support of his assertion that a child does not have the same fundamental right as the father is *Louden v. Olpin*, 118 Cal.App.3d 565; 173 Cal.Rptr. 447 (1981). (Petition 12, fn 8.) That decision does not so hold. It only held that it is beyond the capacity of a court to force a parent to love his child and to spend time with her. At p. 568. Therefore, a child cannot bring an action against her father to compel visitation. *Ibid.* This is far from establishing that a child does not have a fundamental right even to know who her father is, and to obtain financial support from him.

Similarly, none of this court's decisions which petitioner cites supports, let alone compels, applying the rational relationship, rather than the balancing test, in the present case.

For example, in *Parham v. Hughes*, 441 U.S. 347 (1979), the father of an illegitimate child tried to recover damages for the child's wrongful death. Georgia law did not permit such an action. This Court upheld the Georgia statute against the father's equal protection challenges. At pp. 349-358. The father also claimed that the statute violated due process. This court rejected that contention, stating "nowhere in the appellant's brief or argument, however, is there any explanation of how the due process clause is implicated in this case." At p. 358.

The only decision cited by petitioner that involved a due process claim was *Stanley v. Illinois, supra*, 405 U.S. 645. There, this Court held that a father who had raised his illegitimate children was entitled to a hearing on his fitness as a parent, before the state could deprive him of custody over them. *Parham* distinguished *Stanley* on the ground that the father in *Parham* was only asserting the right to sue for money damages. At pp. 358-359.

In *Quilloin v. Walcott*, 434 U.S. 246 (1978) the father of an illegitimate child tried to prevent adoption by the mother's husband. He challenged a Georgia statute which allows adoption in this situation based on the consent of the mother alone. At pp. 248-249. This Court stated: "We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected." At p. 255. The biological father, however, was not seeking custody of the child.

In *Lehr v. Robertson*, 463 U.S. 248 (1983) the issue was whether the biological father had the right to notice, before his illegitimate child could be adopted. This Court held that due process was satisfied by a New York statute which gave him the right to register as the putative father. Since he had not done this, and since he had not

attempted to establish any relationship with his child, he was not entitled to notice. At pp. 263-265.

All of the other decisions cited by petitioner, which did apply the rational relationship test, involved economic legislation. (Petition 13-14.)

Petitioner's contention that the balancing test has only been applied in situations where a parent has tried to rebut the presumption of section 621, is also inaccurate. (Petition 10-11.) On the contrary, the balancing test is routinely applied where the presumption is challenged by either a parent or by a child.

For instance, in *Estate of Cornelious*, 35 Cal.3d 461; 198 Cal.Rptr. 543; 674 P.2d 245 (1984), the presumption was challenged on due process grounds in an action brought by a child. The court upheld the application of the presumption because the child's "private interests are simply not as weighty as those of the putative fathers in *Stanley* and *Lisa R.* who sought to care for and nurture their children." At p. 467. Although the result of the balancing test in *Cornelious* was to resolve it against the child, the court used the same test that the Court of Appeal did here.

In *Michelle W. v. Ronald W.*, 39 Cal.3d 354; 216 Cal.Rptr. 748; 703 P.2d 88 (1985), the presumption was challenged both by the putative father and by the child. Again, the court applied the same balancing test. Concerning the child's claim, the opinion stated: "In *Estate of Cornelious*, as in the case at bench, we apply a balancing test to resove an as-applied challenge to the statute in question." At p. 363. The court simply found that the statutory presumption did not deny the child due process on those facts.

Thus, no decision supports the conclusion that a balancing test is inappropriate when the issue is whether a presumption can constitutionally bar an action to establish paternity brought against an alleged biological father by the mother on behalf of the child.

III. APPLICATION OF CALIFORNIA EVIDENCE CODE SECTION 621 TO THE FACTS OF THIS CASE WOULD BE UNCONSTITUTIONAL.

The leading decision in this area, on which the Court of Appeal correctly relied to guide its analysis, is the decision by the California Supreme Court, *In re Lisa R., supra,* 13 Cal.3d 636; 119 Cal.Rptr. 475; 532 P.2d 123. There, the California Court established a balancing test to be applied for resolving constitutional challenges to presumptions regarding paternity based on marital status. See, also, *Michelle W. v. Ronald W., supra,* 39 Cal.3d 354 at p. 360; 216 Cal.Rptr. 748; 703 P.2d 88.)

In *Lisa R.,* two year old Lisa was adjudged a dependent ward of the court in 1969. At p. 640. She then lived with various foster parents. By 1973, when the trial court held a status review, both her mother and her mother's husband, had died. At pp. 640-642. A man claiming to be Lisa's biological father, who had seen her only a few times during the preceding five years, and not at all in the two years before the hearing, sought to prove that he was Lisa's father. The trial court refused to permit him to litigate the issue. The California Supreme Court reversed.

The issue was whether the man could prove that he was Lisa's father, in spite of the statutory presumption of former Evidence Code section 661. It provided that the child of a woman who was conceived during marriage, was presumed to be the legitimate child of that marriage.

This presumption could only be disputed by the state in a criminal action, by the child's mother or her husband, or by the descendant of one or both of them. A biological father could not dispute the presumption. As to him, "the presumption purports to be conclusive." At p. 647.

The California Supreme Court recognized that the situation raised due process and equal protection issues. It framed the issue as follows, in language which has been the basis for all subsequent California decisions in this area: whether it is constitutional to preclude a party from rebutting this kind of presumption about paternity must be resolved "by weighing the competing private and state interests" in each individual case. At p. 648.

The opinion then discussed the competing interests involved in the case before it. It held that on balance, the man claiming that he was Lisa's natural father had the right to rebut what otherwise would have been a conclusive presumption excluding him as Lisa's father. It first focused on the nature of the rights that he sought to vindicate.

In particular, the man claimed that Lisa had not been conceived as the result of a casual relationship. Rather, he had lived with Lisa's mother, both before and after Lisa's birth, and had contributed to Lisa's support. The opinion also mentioned other factors indicating that he had an interest in Lisa. The opinion then enumerated the State's potential interests. It found that none of them outweighed the father's interests.

First, although the State has a legitimate general interest in a child's welfare, that is not the factor to be considered in doing the balancing. Rather, the courts must measure the State's narrow interest in precluding evidence of parentage, against the private interests at

stake in establishing parentage. The question of the child's general welfare lies beyond the question of her parentage. At pp. 649-650.

In the present case, John has offered no reason to conclude that it would not be in Sabrina's best interest to establish a legal relationship with him, if he is her biological father. Indeed, this would be to Sabrina's benefit, because James is not her father and does not support her. She has had no relationship with James since she was very young. On the other hand, Sabrina developed a daughter/father relationship with John.

Moreover, as the trial judge noted, advances in medical science have made the diagnosis of genetically transmitted diseases much easier. (Ex. 393:3-5.) The State, and Sabrina, thus have this additional reason for determining who her biological father is.

Second, the State can have an interest in maintaining the presumption as a means of accomplishing the purposes of the juvenile court law. At p. 650. This does not exist in the present case.

Third, when *Lisa R.* was decided, the State had an interest in keeping a child from having the stigma of illegitimacy. At p. 650. In *Lisa R.*, this interest did not warrant the conclusiveness of the presumption. If the natural father established his paternity, he would legitimize the child as his own. *Ibid.*

This factor has no application in the present case, because the concept of illegitimacy has been removed from the law in California. *Michelle W. v. Ronald W., supra,* 39 Cal.3d 354 at p. 362; 216 Cal.Rptr. 748; 703 P.2d 88, held that in deciding whether a presumption concerning parentage is constitutionally being applied, the question of whether a child will be stigmatized as "illegitimate" is

irrelevant, because the Uniform Parentage Act (Cal. Civ. Code, §§ 7000, et seq., added by Stats. 1975, Ch. 1245, § 11, pp. 3196-3204) abolished the concept of illegitimacy. Insofar as section 621 was enacted to prevent children from being stigmatized as illegitimate, the Uniform Parentage Act "has rendered such a consideration to be without any legal effect." 39 Cal.3d 354 at p. 362, fn. 5. The opinion explicitly rejected the argument that the stigma of illegitimacy should be considered at all in determining the consitutionality of an application of section 621. *Ibid.* See also, legislative history at Ex. 118.

Fourth, the State has an interest in promoting marriage and in not impugning a family unit. This policy did not outweigh the claimed father's rights in *Lisa R.*, because the family unit had been dissolved by death. *Ibid.* Similarly, the family unit here was dissolved by the termination of Sherry's marriage to James. James has not maintained any relationship with Sabrina since 1982. Thus, this policy does not offset the interests of Sabrina and her mother in establishing John's parentage. If anything, it supports it, because John will legally become part of Sabrina's life.

As the trial judge pointed out, no decision which has upheld the application of the presumption against a constitutional challenge has involved an alleged biological father who sought to use it as a shield against his own paternity. (Ex. 359:25-360:6, 362:2-23.) Rather, they have involved attempts by the alleged biological father and/or the child, to assert paternity in the face of the presumption that the mother's husband was the father. Courts have not allowed such parties to rebut the presumption in these situations because to do so would disrupt the family unit of the presumed father.

By marked contrast, John's use of section 621 as a shield against his paternity cannot be justified by this logic. Indeed, John has offered no valid reason to justify allowing him to use the presumption defensively in this action.

Fifth, the State might assert an interest because the presumption promotes the efficiency of judicial inquiry. The Supreme Court held that on the facts in *Lisa R.*, considerations of efficiency could not outweigh due process rights. At pp. 650-651. In the present case, the advanced blood tests that are now available make it an easy matter to establish whether John is Sabrina's father. (See Cal. Evid. Code, § 895.5 which provides a presumption of paternity if the blood test shows a paternity index of 100 or greater.) James' non-parentage was established by blood tests and a final judgment long ago. Thus, the state's interest in efficiency is even less compelling here, than it was in *Lisa R.*

In summary, it would be at least as much a denial of due process to prohibit Sherry from rebutting the presumption of section 621, as it was not to allow the alleged father to rebut the presumption of former Evidence Code section 661 in *Lisa R.* The lower courts here engaged in precisely the kind of balancing test required by *Lisa R.* They correctly concluded that it would be unconstitutional not to allow Sherry to rebut the presumption. John cannot show that any State interests at all, let alone substantial ones, outweigh the private interests which Sherry is attempting to vindicate.

IV. IT IS NOT NECESSARY TO REACH THE CONSTITUTIONAL ISSUE BECAUSE THE RESULT IS CORRECT ON THE INDEPENDENT GROUND THAT JOHN CANNOT RELY ON THE PRESUMPTION OF EVIDENCE CODE SECTION 621 TO AVOID LITIGATING HIS PARENTAGE SINCE JAMES CONRAD WAS ADJUDGED NOT TO BE SABRINA'S FATHER.

A. Blood Tests Done Before Sabrina's Second Birthday Established That It Was Impossible For James To Be Her Father, And A Binding Judgment So Providing Was Entered As Part Of James And Sherry's Marital Dissolution.

A blood test of James done in 1974 showed that his blood type was AB. (Ex. 15.) A blood test of Sabrina dated August 5, 1981, showed that her blood type was O. (Ex. 16.) Thus, blood tests done before Sabrina was two years old conclusively established that it was impossible for James to be her father. (Ex. 13:6-9.)

James filed for dissolution of his marriage to Sherry when Sabrina was less than 16 months old. It was unnecessary for James to initiate other litigation to raise the parentage issue by court ordered blood tests. Rather, the existing blood typing revealed that James absolutely could not be Sabrina's father.

James and Sherry therefore provided in their Marital Settlement Agreement that James was not Sabrina's natural father. (Ex. 18, ¶1B.) Since James was not Sabrina's father, custody was awarded to Sherry, and no provision for support or visitation by James was made. (Ex. 19, ¶¶2-3.) These agreements became court orders, when their Marital Settlement Agreement was incorporated into the judgment dissolving their marriage. (Ex. 17.)

As a result, there is a judgment that James is not Sabrina's father which is entitled to full effect, in the

absence of extrinsic fraud or mistake which has never been alleged, and did not exist, here. *Zastrow v. Zastrow*, 61 Cal.App.3d 710, 713-714; 132 Cal.Rptr. 536 (1976); *Giovannoni v. Giovannoni*, 122 Cal.App.3d 666, 669-670; 176 Cal.Rptr. 154 (1981). See also *Brown v. Superior Court*, 98 Cal.App.3d 633, 636; 159 Cal.Rptr. 604 (1979) [determination of paternity in default dissolution entitled to res judicata effect absent extrinsic fraud or mistake].

The judgment that James is not Sabrina's father is thus conclusive. As a result, the presumption in section 621 that James is Sabrina's father has been rebutted. It is unavailable as a defense for John in the present proceeding.

If James had challenged his parentage of Sabrina, and if this issue had been fully resolved before she turned two, it would be absolutely impossible for John to defend against the present paternity action by relying on the presumption in section 621. It is only because the judgment in the dissolution action was entered after Sabrina turned two, that John even had a colorable argument that it is not binding on him now. That issue is discussed immediately below.

B. The Procedure James And Sherry Followed Was Sufficient To Rebut The Presumption Of Evidence Code Section 621.

Section 621 permitted James to rebut the presumption that he was Sabrina's father by the results of blood tests. If the blood tests had to be compelled by court order, a motion to obtain them had to be made before Sabrina was two years old. Nothing in section 621 requires the blood test of the presumed father to be performed after the child's birth, or pursuant to a court

order. Ordinarily, all of the tests will have to be done after the birth, because an HLA tissue typing test will be necessary to rule out the mother's husband as having been the child's father. In the present case, James' blood type (AB) was incompatible with Sabrina's blood type (O). This information established the impossibility of his parentage.

The blood tests on which the judgment was based were obtained before Sabrina was two years old. James and Sherry also separated, and James filed for dissolution, considerably before Sabrina's second birthday. It is of no consequence that the judgment in the marital dissolution action was entered shortly after Sabrina's second birthday, for the following reasons.

If Sherry had not agreed that James was not Sabrina's father based on the previous blood tests, James would have been forced to litigate the issue. Even if he had filed a motion for blood tests within two years of Sabrina's birth, the judgment declaring that he was not Sabrina's father most likely would not have been entered until after Sabrina turned two.

It would be absurd to interpret the statute to require litigation regarding the husband's parentage to be concluded before the child is two. In order to comply with such a requirement, an action to dispute parentage would have to be filed long before the child was two. The important time must be when the blood tests were taken, not when the issue of paternity is litigated in court, or finally resolved.

A rule against what James and Sherry did would also be poor social policy because it would require unnecessary litigation. Sherry and James properly agreed to what was the necessary reality within the context of their

pending dissolution action, instead of litigating the issue. They saved judicial time, and expense to both themselves and the courts, by not making idle and frivolous motions.

Contrary to petitioner's suggestion, no public policy was offended by the resolution of this issue in Sherry and James' dissolution judgment. (Petition p. 17, fn. 10.) Neither *In re Marriage of Ayo*, 190 Cal.App.3d 442; 235 Cal.Rptr. 458 (1987) nor *In re Marriage of Goodarzirad*, 185 Cal.App.3d 1020; 230 Cal.Rptr. 203 (1986), precludes what happened here. Neither of those cases involved a situation where the parents agreed that the man was not the father based on what blood tests conclusively established. *Ayo* involved an attempt by a man to avoid paying support for a child he had adopted. *Goodarzirad* involved a father who tried to avoid his child support obligation by giving up all rights to visitation in exchange for a release of the duty to support his child.

There is no evidence which suggests that what Sherry and James did was an attempt to circumvent James' obligation to support Sabrina. Since James was not Sabrina's father, he had no such obligation. James willingly supported Alexis, who was his child. James and Sherry adopted a sensible method of avoiding litigation over Sabrina's parentage, by stipulating to what necessarily would have been the result of such litigation.

John therefore argued that the judgment only determined that James was not Sabrina's natural father, and that this was insufficient to establish that he was not presumed to be Sabrina's legal father under section 621. (Ex. 292-293, Reply Brief 4:5-6:1.) This is incorrect. Section 621 does not distinguish between two types of fathers. When a presumed father rebuts the presumption of section 621 by showing through blood tests that he is not the

child's natural father, and obtains a judgment to that effect, the whole point is that he is no longer the child's legal father. Thus, the effect of the dissolution judgment was to determine that James had no parental status at all.

John further revealed his confusion by contending that to permit what Sherry and James did in their dissolution action would result in great unfairness by shifting responsibility for support to third parties, or to the state. (Reply Brief 6:23-26.) Not so. The unfairness would be to require James to support a child whom he did not father, and to allow John to escape from supporting the child whom he did father. Moreover, the fact that John cannot avoid this litigation by hiding behind the presumption of section 621, does not necessarily mean that he automatically will have to support Sabrina. Sherry must still establish that John is Sabrina's father.

C. It Would Not Matter If James Raised The Issue Of His Parentage In The Dissolution Action During The Month After Sabrina Turned Two Years Old.

The record does not reflect exactly when, during the pendency of James and Sherry's marital dissolution action, the question of James' parentage was first raised. It appears that James raised the issue sometime during the summer of 1983, and that it was resolved at a meeting in August 1983. (RT 115:23-116:6.) Sabrina turned two on July 30, 1983.

John therefore argued below that James did not "raise the issue" within the two years provided by section 621. (Ex. 378:24-380:21.) John also sought to undermine the force of the prior judgment by noting that both James' petition for dissolution of marriage, and Sherry's

response, asserted that Sabrina was a child of their marriage. (Ex. 58, 60.) These facts do not undermine the validity of the judgment declaring that James is not Sabrina's father, for the following reasons.

The predicate for John's argument is that the two year provision in section 621 operates as a statute of limitations for the mother's husband to rebut his presumed parentage. (Ex. 379:15.) This requires the conclusion that even if James raised the issue in the dissolution proceeding after Sabrina turned two, it would have been considered timely over Sherry's objection, because of numerous rules governing the operation of statutes of limitation.

First, James filed the dissolution action well before Sabrina's second birthday. He listed Sabrina as a child of the marriage because that was what he believed. When the true facts later came to light, James could have amended his petition to allege that Sabrina was not his child. Under California law, this amendment would have related back to the date that James' original petition for dissolution had been filed, for the purpose of satisfying the statute of limitations. See discussion in 5 Witkin, *California Procedure* [3d ed. 1985], Pleading § 1108, p. 526 [law governing civil actions applies to amendment of pleadings in marital litigation], Pleading § 1115, p. 532 [amendments generally relate back to date of filing original pleading for purpose of statute of limitations], Pleading § 1121, p. 537 [amendments are liberally allowed to correct allegations made by mistake], Pleading § 1125, p. 541 [amendment contradicting an admission in original pleading allowed on a showing of mistake], Pleading § 1162, pp. 579-581 [modern view allows amendment

even to change cause of action if it relates to the same general set of facts].

Second, there is no question but that James had the right to rebut the presumption of section 621 in the course of his dissolution action, simply by producing blood tests which showed that he could not be Sabrina's father. Cal. Evid. Code, § 621, subd. (c). If Sherry had objected that James was raising the issue too late, he would have been able to invoke the doctrine of estoppel.

James thought that Sabrina was his child when he filed for dissolution. Sherry's response did not dispute this. Under these circumstances, when James learned the truth soon after Sabrina turned two, the statute of limitations could not be invoked to deprive him of the right to establish his non-parentage. See 3 Witkin, *California Procedure* [3d ed. 1985] Actions, §§ 530-531, pp. 559-560 [statute does not run when the plaintiff is kept in ignorance of facts crucial to his claim].

In view of the valid judgment determining that James is not Sabrina's father, the presumption of section 621 simply falls out of the picture. The present situation is the same as if Sabrina had been born out of wedlock, and Sherry brought this action to determine that John is Sabrina's father. There is no requirement that such an action be commenced against John before Sabrina turned two. See *Perez v. Singh*, 21 Cal.App.3d 870, 872; 97 Cal.Rptr. 920 (1971) [paternity action brought when child was teenager timely because mother acts for the child and the statute of limitations is tolled during the minority of a child].

Thus, the trial court's ruling that John submit to blood tests can be upheld, without even reaching the constitutional issues.

V. CALIFORNIA EVIDENCE CODE SECTION 621 IS UNCONSTITUTIONAL FOR TWO ADDITIONAL REASONS, WHICH THE COURT OF APPEAL DID NOT HAVE TO REACH.

A. The Statute Violates Equal Protection Principles Because It Irrationally Discriminates Between Men And Women Regarding How The Presumption Of The Husband's Parentage Can Be Rebutted.

Originally, the presumption of section 621 could not be rebutted with blood test evidence by either the child's mother or the mother's husband. The California Legislature perceived the inequity in this situation and amended the statute in 1980 to allow the husband, but not the wife, to rebut the presumption by blood test evidence. (See Ex. 127-131, Legislative History lodged with the Court of Appeal by petitioner.) The Legislature then recognized that this was disparate treatment of the spouses. *(Ibid.)* Therefore, at the beginning of the next legislative session, the author of the 1980 amendment introduced a bill which amended section 621 to permit the mother to rebut the presumption by evidence of blood tests. *(Ibid.)*

This amendment still leaves an equal protection violation. In addition to blood tests, the mother must submit an affidavit acknowledging paternity from the person whom she believes is the child's biological father. Cal. Evid. Code, § 621, subd. (d). The father can rebut the presumption by blood tests, without meeting any additional requirements. Cal. Evid. Code, § 621, subd. (c).

Section 621 therefore unquestionably treats the male and female partners to a marriage differently, regarding how each of them can rebut the presumption that the

husband is the father of a child born during their marriage. John relied on this difference to argue that Sherry cannot rebut the presumption of section 621 because she has not, and cannot, obtain the requisite affidavit from him. (Petition in Court of Appeal 17:11-14.)

Classifications based on sex are suspect, especially when they involve a fundamental interest. Therefore, to justify such disparate treatment, the state must show "a compelling" interest. *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973). No compelling state interest exists in the present situation. The equities are precisely to the contrary.

When the husband rebuts the presumption of his paternity solely by evidence of blood tests, this leaves the child without a father, and without a source of child support from a man, unless someone establishes who the child's real father is. The husband is not required to assure that such a person is found. There is no reason to impose this additional burden on the mother. Indeed, its imposition is especially unreasonable in a situation where, as here, the person whom the mother believes is the child's father refuses even to take a blood test.

John argued that the additional burden placed on the mother to obtain an affidavit from the alleged biological father is justified by the fact that she is challenging another person's parentage, not her own. (Reply Brief 13:3-14.) While John has pointed to a difference between an action between the mother and the presumed father, it is not a difference which is at all rationally related to the additional requirement. There is no reason why the father, just because he is challenging his own paternity, should not have to come forward with an affidavit from the alleged biological father. If anything, it would make

more sense to require this of him than of the mother, since he would be trying to avoid his own financial responsibility.

The statute arbitrarily and capriciously distinguishes between the sexes without any rational basis, let alone a compelling state interest. The trial court correctly perceived that this disparate treatment made the statute subject to an equal protection challenge. (Ex. 334:10-335:17, 390:26-392:10.)

B. The Statute Is Unconstitutional Insofar As It Requires The Presumption To Be Rebutted Within Two Years.

In *Michelle W. v. Ronald W., supra,* 39 Cal.3d 354; 216 Cal.Rptr. 748; 703 P.2d 88, the California Supreme Court suggested that a two year statute of limitations within which to rebut the presumption may not be adequate to satisfy due process concerns. At p. 358, fn.1, citing this Court's decision in *Mills v. Habluetzel,* 456 U.S. 91 (1982). The California Supreme Court did not reach that issue, because the statute was not challenged on this basis in *Michelle W.* Recently, in *Clark v. Jeter, supra,* ___ U.S. ___; 108 S.Ct. 1910; 100 L.Ed.2d 465, this court held that Pennsylvania's six year statute of limitations within which to file a paternity action was unconstitutional. Sherry submits that the two year statute of limitations in California Evidence Code section 621 is also unconstitutional.

It must be remembered that what is ultimately at stake in a paternity action is the minor child's right to have her real father identified and their relationship established. Thus, the mother essentially is prosecuting the action on behalf of her child. *Perez v. Singh, supra,* 21

Cal.App.3d 870, at p. 872; 97 Cal.Rptr. 920. It is for this reason that no statute of limitations exists for bringing a paternity action under the Uniform Parentage Act. *Ibid.* Moreover, under California Code of Civil Procedure section 352, a minor's cause of action is tolled during the child's minority. *Jessica H. v. Allstate Ins. Co.*, 155 Cal.App.3d 590, 594-596; 202 Cal.Rptr. 239 (1984) [the general tolling of statutes of limitation for minors supercedes any specific statute of limitations which might otherwise terminate a child's rights].

Thus, to the extent that Sherry is suing to vindicate rights which really belong to Sabrina, the obstacle of a two year statute of limitations unfairly deprives Sabrina of due process and should be declared unconstitutional.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied.

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Respectfully submitted,

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